

due to fraud. Two alliances of rural cellular carriers argued that, in drafting any roaming rule, the Commission should consider the technical obstacles faced by providers that do not have SS7 capability, as well as rural cellular licensees' alleged lack of market power.

III. Description and Estimate of the Small Entities Subject to the Rules:

The rule adopted in this *Second Report and Order* will apply to cellular, broadband PCS, and geographic area 800 MHz and 900 MHz SMR licensees, including licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under Section 90.629 of the Commission's Rules. However, the rule will apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network.

A. *Estimates for Cellular Licensees*

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.⁸⁴ Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small cellular businesses and is unable at this time to determine the precise number of cellular firms which are small businesses.

The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.⁸⁵ We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.⁸⁶ Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the current

⁸⁴ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

⁸⁵ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

⁸⁶ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses.

Two alliances of rural cellular licensees filed comments in which they argued that a roaming rule may have an especially large impact on rural licensees. In its comments, the Rural Cellular Coalition states that it has 12 members which serve licensed cellular areas encompassing approximately 3 million people; the Rural Cellular Association states that its members serve areas with a cumulative population of more than 6 million. We do not have information, however, sufficient to support a meaningful estimate regarding the total number of rural licensees, nor do we have specific information regarding how many rural cellular licensees are small entities. For purposes of this FRFA, we assume that all rural cellular licensees are small entities, as that term is defined by the SBA.

B. Estimates for Broadband PCS Licensees

The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of not more than \$40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.⁸⁷

The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. As of now, there are 90 non-defaulting winning bidders that qualify as small entities in the Block C auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the rule adopted in this *Second Report and Order* includes the 90 winning bidders that qualify as small entities in the Block C broadband PCS auctions.

At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of not more than \$125 million. However, we cannot estimate how many of these licenses will be won by small entities, nor how many small entities will win D and E Block licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume,

⁸⁷ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Red 5532, 5581-84 (1994).

for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

C. *Estimates for SMR Licensees*

Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average gross revenues of not more than \$15 million in the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.⁸⁸

The rule adopted in this *Second Report and Order* applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses in this category. We do know that one of these firms has over \$15 million in revenues. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA.

The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this *Second Report and Order* includes these 60 small entities.

No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA's definition will win these licenses. Given

⁸⁸ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

IV. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The rule adopted in this *Second Report and Order* imposes no reporting or recordkeeping requirements. The only compliance requirement is that licensees subject to the rule (*i.e.*, cellular licensees, broadband PCS licensees, and geographic area 800 MHz and 900 MHz SMR licensees that offer real-time, two-way, interconnected switched voice service) must provide manual roaming service upon request to subscribers in good standing of covered services who are using technically compatible equipment.

V. Steps Taken to Minimize the Economic Impact on Small Entities:

The rule adopted in this *Second Report and Order* only requires certain CMRS licensees to provide manual roaming service to eligible subscribers upon request. The Commission determines on the present record not to promulgate any rule governing roaming agreements between carriers, but instead to request further comment regarding the need for any such rule and the costs that it would impose. Thus, the Commission in this *Second Report and Order* avoids potential burdens that a rule governing intercarrier roaming agreements might impose on small entities, including questions regarding the feasibility and cost of offering automatic roaming under certain circumstances, the administrative costs of entering into roaming agreements, and possible exposure to fraud. Furthermore, the rule requires covered licensees to provide service only to subscribers who are using equipment that is technically capable of accessing their systems. The rule therefore does not require carriers to adopt particular technologies or to modify their networks to accommodate roamers using different technologies.⁸⁹ Because the rule neither requires carriers to enter into roaming agreements nor impacts their technological choices, it does not implicate the concerns raised by rural carriers.

The Commission also determines not to apply its roaming rule to CMRS providers other than cellular, broadband PCS and certain SMR licensees. Many of the providers that are thereby excluded from the rule are small entities, including paging, narrowband PCS, air-ground, public coast service, and non-covered SMR providers. In addition, the Commission requests comment on whether it should sunset the rule adopted herein five years after it awards the last group of initial licenses for currently allotted broadband PCS spectrum.

⁸⁹ See *Second Report and Order*, para. 13.

Finally, the Commission believes that the rule adopted in this *Second Report and Order* will benefit certain small entities by ensuring that subscribers of providers that do not have a nationwide presence or affiliations will have the same right to obtain roaming service as subscribers to competing larger carriers, provided they are using technically compatible equipment.

VI. Significant Alternatives Considered and Rejected:

The Commission considered and rejected the alternative of not extending its existing manual roaming rule beyond cellular licensees and cellular subscribers. Instead, the Commission concluded that the rule should extend to broadband PCS and covered SMR services in order to protect smaller and newer providers of these services from likely competitive disadvantage. At the same time, the Commission rejected the alternative of extending the rule to other CMRS services because the record did not establish that ubiquitous roaming capability is important to the competitive success or utility of these services. The Commission also rejected the alternative of promulgating a rule governing intercarrier roaming agreements in this *Second Report and Order* because the record did not sufficiently illuminate the costs and benefits of any such rule. Finally, the Commission rejected any alternative that would require carriers to adopt particular technologies or modify their physical networks.

VII. Report to Congress:

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

APPENDIX C

Initial Regulatory Flexibility Analysis

I. Reason for Action:

This Third Notice of Proposed Rulemaking (*Third NPRM*) requests comment on whether the Commission should promulgate transitional regulations governing certain commercial mobile radio service (CMRS) providers' obligations to enter into "automatic" roaming agreements with other carriers. The Commission determines that a further NPRM is necessary because the existing record does not sufficiently illuminate the costs and benefits of an automatic roaming rule. In particular, at the time comments were filed no broadband PCS providers were in operation, and most providers were only beginning to formulate their business plans. Therefore, the record does not reflect the actual experience of broadband PCS providers in attempting to negotiate roaming agreements. Although some comments in the record suggest that an automatic roaming rule may be necessary to ensure new entrants an equal opportunity to compete, other commenters argue that established providers do not have an incentive to deny automatic roaming agreements or unreasonably discriminate against new entrants.

The Commission also requests comment on whether the manual roaming rule adopted in the *Second Report and Order* should sunset five years after the last group of initial licenses for currently allotted broadband PCS spectrum is awarded. Although the Commission expects that market forces will render a manual roaming rule unnecessary once broadband PCS licensees have substantially built out their networks, the existing record is insufficiently developed to support a decision regarding the advantages, disadvantages, and implications of sunsetting the manual roaming rule.

II. Objectives of Proposed Rules:

The Commission's principal objective in this *Third NPRM* is to obtain information on the costs and benefits of an automatic roaming rule. In particular, the Commission seeks comment on whether it should adopt a rule requiring providers that enter into roaming agreements with any other provider to make like agreements available to similarly situated providers under nondiscriminatory rates, terms, and conditions. The Commission also seeks comment on the potential costs of an automatic roaming rule, including whether such a rule would inadvertently impede technological progress, whether it would interfere with free and open competition, whether it would expose providers to the risk of losses due to fraud, and what administrative costs would be involved. The Commission seeks comment on how any rule should be drafted to minimize such costs. An additional objective is to obtain information on the advantages, disadvantages, and implications of sunsetting the manual roaming rule.

III. Legal Basis for Proposed Rules:

If adopted, any changes to the Commission's roaming rules would be authorized under Sections 1, 4(i), 4(j), 201, 202, 303(r), 309, 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 303(r), 309, 332, 403.

IV. Description and Estimate of Small Entities Subject to the Rules:

Pursuant to the Contract with America Advancement Act of 1996,⁹⁰ the Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total CMRS entities would be affected by the regulations on which the Commission seeks comment in this *Third NPRM*. In particular, we seek estimates of how many affected entities will be considered small businesses.

The regulations on which the Commission seeks comment, if adopted, would apply to providers of cellular, broadband PCS, and geographic area 800 MHz and 900 MHz specialized mobile radio services, including licensees who have extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under Section 90.629 of the Commission's Rules. However, the rules would apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network.

As explained in the Final Regulatory Flexibility Analysis for the *Second Report and Order* (Appendix B), there are different definitions of "small business" for the various services affected by this proceeding. Since the Commission has not defined small business with respect to cellular service, we are utilizing the Small Business Administration's definition applicable to radiotelephone companies -- *i.e.*, an entity employing fewer than 1,500 persons.⁹¹ With respect to broadband PCS, the Commission has refined the definition of a small business to mean firms that have had average gross revenues of not more than \$40 million in the preceding three calendar years.⁹² With respect to 800 MHz and 900 MHz SMR services, the Commission has defined small businesses as firms that have had average gross revenues of not more than \$15 million in the preceding three calendar years.⁹³

⁹⁰ Pub. L. No. 104-121, 110 Stat. 847 (1996).

⁹¹ 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

⁹² See 47 C.F.R. § 24.720(b).

⁹³ See 47 C.F.R. § 90.814(b)(1).

We seek comment as to whether our use of these definitions is appropriate in this context. Additionally, we request commenters to identify whether they are small businesses under these definitions. For commenters that are a subsidiary of another entity, we seek this information for both the subsidiary and the parent corporation or entity.

V. Reporting, Recordkeeping, and Other Compliance Requirements:

The proposals under consideration in this *Third NPRM* would not involve any reporting or recordkeeping requirements. The only likely compliance requirement would be to refrain from prohibited discrimination in offering roaming agreements to other carriers. If a sunset of the manual roaming rule is adopted, the effect would be to relieve affected providers from compliance requirements after the sunset takes effect.

VI. Significant Alternatives Considered and Rejected:

The Commission considered and rejected the alternative of adopting an automatic roaming rule in the *Second Report and Order*. The Commission concluded that the record did not establish that an automatic roaming rule is necessary, nor did it sufficiently develop the costs of any such rule. At the same time, the Commission rejected the alternative of declining to adopt an automatic roaming rule without further inquiry. Some commenters made cogent arguments that established providers might have the ability and incentive to disadvantage their competitors by denying them nondiscriminatory roaming agreements, and the Commission believed these arguments should be further explored in light of ongoing developments.

The Commission did determine, however, that certain forms of regulation should not be proposed in the *Third NPRM*. In particular, the Commission rejected any proposal that would require carriers to adopt particular technology or modify their networks so as to offer roaming arrangements to any provider. Similarly, the Commission determined not to propose regulation of agreements between carriers to hand off calls in progress because the record indicated that such arrangements may be technically and administratively complex and because there was no evidence that access to such arrangements is important to providers' ability to compete. The Commission also rejected any alternative that would require carriers to do more than refrain from discrimination among similarly situated providers. Thus, the Commission does not propose to require carriers to offer roaming agreements under any particular terms and conditions, or even to offer roaming service to any carrier at all.

In addition, the Commission rejected the alternative of proposing to apply any automatic roaming rule to CMRS providers other than cellular, broadband PCS, and covered SMR carriers because the record did not establish that ubiquitous roaming capability is important to the competitive success or utility of these services. The Commission also rejected the alternative of proposing to continue any automatic roaming rule indefinitely

because it believes that any necessity that may now exist for such a rule would be obviated once broadband PCS networks are substantially built out. With respect to manual roaming, the Commission requests comment on a sunset for similar reasons, but it rejected the alternative of imposing a sunset in the *Second Report and Order* because the existing record does not sufficiently develop the implications of such a sunset.

VII. Federal Rules That Overlap, Duplicate, or Conflict with These Proposed Rules:

None.

VIII. IRFA Comments:

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis (IRFA). Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines specified in paragraph 37 of the *Second Report and Order and Third Notice of Proposed Rulemaking*.

APPENDIX D

Final Rules

Parts 20 and 22 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

Part 20 - COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1092, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 20.12 is amended by revising the heading and adding new paragraph (c) to read as follows:

Section 20.12 Resale and roaming.

(c) *Roaming.* Each licensee subject to this Section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this Section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

Part 22 - PUBLIC MOBILE SERVICES

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 22.901 is amended by revising the introductory paragraph to read as follows:

Section 22.901 Cellular service requirements and limitations.

Cellular system licensees must provide cellular mobile radiotelephone service upon request to subscribers in good standing, including roamers, as provided in § 20.12 of this chapter. A cellular system licensee may refuse or terminate service, however, subject to any applicable requirements for timely notification, to anyone who operates a cellular telephone in an airborne aircraft in violation of § 22.925 or otherwise fails to cooperate with the licensee in exercising operational control over mobile stations pursuant to § 22.927.

SEPARATE STATEMENT OF
COMMISSIONER RACHELLE B. CHONG

Re: Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket 94-54

In the early days of cellular telephones, the ability of customers to use their cellular phones when they were "roaming" outside of their home service area was limited. Not all cellular carriers offered roaming, and those who did, offered roaming only in select cities. When roaming was available, it was often a cumbersome process. For example, customers would have to give a valid credit card number to roam, and customers could not automatically receive calls when they were travelling. A caller trying to reach a roaming customer had to know what city the roamer was in and the roamer access number of that city. In those early days, roaming was also expensive. It was common for systems to charge a daily access fee of several dollars in addition to a high per minute rate.

Today, the cellular industry has matured, and customer demand has resulted in roaming being widely available to cellular subscribers. Most cellular carriers have roaming agreements with cellular carriers in other markets that permit their customers to automatically roam in most parts of the nation. Cellular carriers have realized that many subscribers desire the ability to use their mobile phone when travelling, and these carriers welcome the additional roaming revenue realized.

The process of roaming is also significantly easier now. With the advent of such programs such as "follow me roaming," subscribers can now automatically receive calls almost anywhere they are roaming. In addition, many features (e.g. call waiting and call forwarding) now "follow" customers when they roam. Roaming rates have also decreased significantly. Many carriers have found that customers are more inclined to roam when they are guaranteed consistent nationwide or region-wide rates.

I note that all of these advancements in roaming occurred without a Commission rule or regulation requiring cellular carriers to enter into automatic roaming agreements with each other. For this reason and because competition in the Commercial Mobile Radio Service (CMRS) market is dramatically increasing with the introduction of multiple new PCS providers, I supported the original tentative conclusion in our Second Notice of Proposed Rulemaking (*Second Notice*) in this proceeding that we should monitor the development of

I further believe that regulation should be imposed only when it is necessary to serve the public interest. It has been argued that automatic roaming is critical during the "headstart" period when the new providers are entering the competitive wireless market so that they can effectively compete with the cellular incumbents. I am not convinced that a new entrant must have access to automatic roaming agreements with every CMRS provider in the nation in order to compete successfully in the wireless market. Traditionally, the majority of roaming takes place in markets near the home market. Unlike the smaller cellular geographic service areas, PCS service areas (MTAs and BTAs) are much larger in size. Thus, PCS customers can travel much further distances without having to roam. In addition, not all wireless customers require roaming capabilities as a condition of subscription. In this regard, it appears that the first broadband PCS system in the nation is very successfully attracting a large number of customers even though it is unable to offer any roaming capability at this time.

On the contrary, I have some concerns that the imposition of automatic roaming requirements might inadvertently hinder competition in the CMRS market in practice. In addition to cellular rates and service plans, cellular carriers compete vigorously in their marketing efforts on the basis of their roaming footprint and roaming rates. If we mandate an automatic roaming requirement, CMRS providers may not be able to differentiate their roaming products as they do today. This may actually serve to lessen overall competition in the CMRS market.

Finally, I believe that we need to carefully consider the burdens and costs associated with the imposition of an automatic roaming regulation. There are currently approximately 1,400 cellular systems. We anticipate that broadband PCS and covered SMR providers, once licensed, will more than double that number. If a CMRS carrier enters into one automatic roaming agreement (and nearly all do in adjacent areas as a practical matter), our rules may require that carrier to enter into a like agreement with every similarly situated provider in the nation where technically compatible handsets are being used. Such a requirement could result in the imposition of significant network and administrative costs. These costs would only be increased if the roaming requirement were extended to resellers. I invite commenters to expand on what the scope of these network and administrative costs may be. I am particularly interested in hearing from small carriers as to whether they think they can absorb these costs or recover them from their customers or other carriers, should an automatic roaming requirement be imposed.